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JAMES R. BROWNI

IN THE

Supreme Court of the United States

October Term, 1959

No. 4 Original

STATE OF NEW YORK

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO

Report of Special Master Upon Motion of Complainant for Leave to File a Supplemental and Amended Complaint

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to the order of the Court entered January 11, 1960, your special master submits the following report with respect to the motion filed by the State of New York on October 21, 1959, for leave to file a supplemental and amended complaint.

SUMMARY OF CONCLUSIONS AND RECOMMENDATION

The matters presented in the supplemental and amended complaint which the State of New York seeks leave to file are relevant to the issues raised in its original bill of complaint, are substantially similar to allegations contained in the amended application filed November 3,

1958, by the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York for a reopening and amendment of the decree of April 21, 1930, which amended application was granted by the Court on June 29, 1959, and are also substantially similar to allegations contained in certain affirmative defenses and counterclaims set out in the answer filed by the State of New York in the declaratory judgment suit brought by the State of Illinois, No. 12, October Term, 1959, which has also been referred to me and consolidated for hearing with this and two other companion suits. These matters are appropriate to be considered by the Court in order to adjudicate the entire controversy between the parties in the light of present conditions and to do complete justice.

It is accordingly recommended that the motion of the State of New York for leave to file a supplemental and amended complaint be granted.

Discussion

The original bill of complaint in this suit was filed on October 18, 1926. Briefly summarized, it alleged that the State of Illinois through its subordinate agency the Sanitary District of Chicago diverted large amounts of water from Lake Michigan into the Mississippi watershed in violation of the rights of the State of New York and its citizens (a) in the development of electric power in the Niagara River and the international section of the St. Lawrence River; (b) in the free and unobstructed use of the Great Lakes waterway and the various ports and harbors thereof for purposes of navigation, trade and commerce; (c) in the use of the Great Lakes for fishery purposes; (d) in the enjoyment of riparian rights and shipping and commercial rights on and in the Great Lakes, and (e) in the use of the natural waters of the Great Lakes

watershed for the use and maintenance of the pleasure and convenience of the people of the State of New York, all to the damage of the State of New York and its citizens. The bill of complaint sought an injunction restraining the defendants from permanently diverting any water whatever from Lake Michigan and its watershed.

By an order entered May 31, 1927, the Court struck from the bill of complaint the third paragraph thereof which alleged that the right of the State of New York to use the waters of the Niagara and St. Lawrence Rivers for the development of electric power is a property right of the State and its citizens which the defendants had no right to destroy or impair by diverting water from Lake Michigan into the Mississippi waterway. This action was taken by the Court, as appears from its opinion reported at 274 U. S. 488, because there was no allegation in the bill of complaint that there was any present use of the waters for such purposes which was being or would be disturbed and that there was then no definite project for so using them which was being or would be affected. The action of the Court was, however, expressly stated to be "without prejudice, so that the plaintiff State, if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present."

In its opinion handed down on January 14, 1929, upon the report of its special master in this suit and the two companion suits, one brought by the States of Wisconsin, Minnesota, Ohio and Pennsylvania and the other by the State of Michigan, 278 U. S. 367, the Court held that the diversion of water from Lake Michigan by the defendants in excess of that needed to preserve navigation on the Chicago River was without legal justification and in violation of the rights of the plaintiffs. However, because of the danger which might ensue to the health of the people

of the Chicago area the Court did not order immediate cessation of such diversion but rereferred the matter to its special master to determine and report the necessary steps which would bring an end to the defendants' violation of the plaintiffs' riparian rights and the unwarranted part of the diversion.

Following the report of the special master on the rereference the Court determined, 281 U. S. 179, that under the then existing facts and circumstances and in the light of the limitations upon the efficiency of sewage treatment methods then in use the Court should enter a decree providing for a reduction in the diversion by gradual stages until it should be no more than 1,500 cubic feet per second plus domestic pumpage. The Court did not at that time enjoin the diversion of such domestic pumpage but stated that "If the amount withdrawn should be excessive, it will be open to complaint" (281 U. S. 179, 200), and the Court directed that the decree should contain a provision

> "That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy" (281 U. S. 179, 202).

A decree in accordance with its opinion was entered by the Court on April 21, 1930, 281 U. S. 696.

On December 23, 1957, the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York filed in this and the two companion suits an application for a reopening and amendment of the decree of April 21, 1930, and for the granting of further relief. The application and

a prior motion by the State of New York to somewhat similar effect were denied by the Court without prejudice on March 3, 1958, 355 U. S. 944. Thereafter, on November 3, 1958, the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York filed an amended application for the same relief which was granted by the Court by order entered June 29, 1959, 360 U. S. 712, and this and the companion suits were referred to me as special master to take testimony and make report. Thereafter on October 21, 1959, the State of New York filed in the Court a motion for leave to file a supplemental and amended complaint to which the defendants filed a brief in opposition. By order entered January 11, 1960, the Court referred the motion and response to me for an expression of my views as to the relationship of the matters presented therein to the issues in this suit.

As has been stated, the original bill of complaint filed by the State of New York sought relief, by way of injunction, from the permanent diversion by the defendants of water from Lake Michigan which it alleged was in violation of its rights as a sovereign state bordering on the Great Lakes and which it further alleged had caused it and its citizens injury in the production of hydroelectric power, the navigation of the lakes, the fisheries in the lakes, the exercise of riparian rights on the shores of the lakes and the use of the waters of the lakes for the pleasure and convenience of its people. As has also been pointed out the allegation with respect to injury in the production of electric power was stricken from the complaint by the Court upon the ground that no such damage had then been suffered or was in prospect and without prejudice to the reassertion of that element of damage if later on the State should be in a position to do so.

The amended application for the reopening of the de-

cree of April 21, 1930, alleged, inter alia, that the domestic pumpage of Chicago which is now permanently diverted from Lake Michigan has increased and will continue to increase beyond the limits which were estimated in 1930 and will become more and more excessive to the irreparable harm and injury of the plaintiffs. It further alleges that the cessation of the permanent diversion of water from Lake Michigan as domestic pumpage will not injure or impair the health of the people of the Chicago area or the navigability of the port and waterways in that area. The amended application further avers that substantial damage to the plaintiffs has been and is being caused by the permanent diversion of water from Lake Michigan as domestic pumpage with the resultant artificial lowering of the levels of all of the Great Lakes below Lake Superior and their connecting channels and the St. Lawrence River above Montreal. It is alleged that such damage falls into four general classes, namely, (1) damage to navigation and commercial interests; (2) damage to riparian property of a non-navigational character; (3) damage to the proprietary and quasi-sovereign rights of the plaintiff States, and (4) damage and loss caused to the State of New York and her citizens by defendants' diminution of the flow of the waters of the Niagara and St. Lawrence Rivers which are used for the generation of hydroelectric power at power sites on the Niagara River which are now under construction and which are to be in full operation in a few years and on the St. Lawrence River where the New York power project is substantially completed and in operation.

By their amended application filed November 3, 1958, and a motion to amend the prayer for relief in their amended application, which was filed on April 30, 1959, with their reply brief, the plaintiffs ask the Court to require the defendants to return the treated effluent emanat-

ing from their sewage and industrial treatment facilities to the Great Lakes basin from which it originally came in the form of domestic pumpage or, if it should be determined that measures other than the return to Lake Michigan of the Chicago domestic pumpage effluent can be put into effect so that such measures will reduce either the direct diversion or limit or restrict the Chicago domestic pumpage to the end that the total amount of diversion of water from the Great Lakes at Chicago will be reduced or restricted, the Court should enter a supplemental or modified decree to that effect. Finally they pray that the Court grant such other relief in accordance with equity and good conscience as will insure to the greatest possible degree the future integrity and development of the Great Lakes reservoir so that the maximum use and benefit of its waters may be assured to the plaintiff States.

On June 29, 1959, the Court granted leave to the State of Illinois to file a complaint against the States of Michigan, Ohio, Pennsylvania, Minnesota, New York and Wisconsin seeking a judgment declaring the right of the Elmhurst-Villa Park-Lombard Water Commission, an instrumentality of the State of Illinois, to withdraw water from Lake Michigan for domestic use (No. 12, October Term 1959), and referred the complaint to me to take testimony and report along with the present suit (No. 4, October Term, 1959), and the two other companion suits (Nos. 2 and 3, October Term, 1959), 360 U. S. 712. To that complaint the State of New York has filed an answer containing a number of affirmative defenses and counterclaims. Included in the third affirmative defense and second counterclaim in the answer filed by the State of New York are allegations of the right of the State of New York and its citizens to the natural flow of the Great Lakes for the production of hydroelectric power in the Niagara and St. Lawrence Rivers, the construction of hydroelectric power projects in the St.

Lawrence and Niagara Rivers designed to utilize the entire United States share of the natural flow of the rivers available for power purposes, and the loss in the production of such power which the diversion proposed by the Elmhurst-Villa Park-Lombard Water Commission would cause to the State of New York.

The answer and counterclaims filed by the State of New York conclude with a prayer for a judgment that neither the State of Illinois nor the Elmhurst-Villa Park-Lombard Water Commission has any right to divert any waters from the Great Lakes watershed unless the effluent, after proper purification, is returned thereto, and an injunction restraining any such diversion, or, if the Court should determine that such diversion should not be absolutely enjoined, then determining the extent of the injury to the defendant and providing compensation therefor.

It is thus alleged in the amended application for the reopening and amendment of the decree of April 21, 1930, and in the answer of the State of New York in the declaratory judgment suit brought by the State of Illinois (No. 12, October Term, 1959), that there have been at least two significant changes in the conditions which existed in 1926 when the original bill of complaint was filed, namely, (1) that the amount of water permanently withdrawn from the Great Lakes by Chicago for domestic pumpage is substantially greater than the amount then contemplated, and (2) that the State of New York is now actually engaged in the production of hydroelectric power in the St. Lawrence River and will in the very near future complete and operate works for the production of hydroelectric power on the Niagara River. In addition it is alleged that the St. Lawrence Seaway project has been completed and is now in operation, opening up the Great Lakes to navigation by ocean-going vessels having a draft up to 27 feet.

The motion of the State of New York for leave to file a

supplemental and amended complaint is based upon the ground that the subject matter of the allegations with respect to injury to hydroelectric power production stricken from its original bill of complaint by this Court on May 31, 1927, as prematurely raised have now become of immediate relevance and that New York is now in position to show present injury to itself, its citizens and agencies, at its hydroelectric power plant on the St. Lawrence River and injury in the immediate future at the plant now nearing completion on the Niagara River and on the further ground that certain facts alleged in the original complaint have been altered, modified and affected by events, changes and developments occurring in the 33 years which have intervened since the filing of the original bill of complaint, including, inter alia, the opening of the St. Lawrence Seaway. The motion is made under the leave given by the order of May 31, 1927, and under the provisions of Rule 15(d) of the Federal Rules of Civil Procedure as made applicable to original actions by Rule 9(2) of the rules of the Court.

CONCLUSIONS

The new allegations of the proposed supplemental and amended complaint are substantially similar to those contained in the amended application for the reopening and amendment of the decree of April 21, 1930, and in the answer of the State of New York filed in the pending suit brought by the State of Illinois against it and the five other Great Lakes States (No. 12, October Term 1959). In my opinion the matters set out in those allegations directly bear upon the issues originally raised and now presented in this suit and are appropriate to be considered in the determination of those issues. I have ruled in the hearings now pending before me that the allegations made in the amended application and answer just referred to are before me for consideration under the reference of June 29, 1959,

and I have accordingly permitted the introduction of evidence bearing upon the allegations of the State of New York of injury to its present and prospective production of hydroelectric power in the St. Lawrence and Niagara Rivers. It seems obvious to me that the Court intended, in granting the application to reopen the decree of April 21, 1930, and in permitting the filing of the complaint and answers in the declaratory judgment suit brought by the State of Illinois (No. 12, October Term 1959), to open the way for the reconsideration of the entire controversy between the parties in the light of present conditions rather than those which existed more than 30 years ago. It accordingly seems appropriate to me that the supplemental and amended complaint should be permitted to be filed by the State of New York in order that the formal pleadings in this suit may actually reflect the existing conditions and present the entire controversy between the parties. No delay in the proceedings will result from such filing since evidence is already being taken by me upon the issues raised by the amended application and the answer filed by the State of New York in the declaratory judgment suit brought by the State of Illinois (No. 12, October Term 1959), which, as has been stated, are substantially similar to those sought to be raised by the supplemental and amended complaint.

RECOMMENDATION

It is accordingly recommended that the motion of the State of New York for leave to file a supplemental and amended complaint be granted and that the defendants be directed to file their answer thereto within twenty days.

Respectfully submitted,

ALBERT B. MARIS
Special Master